NO: 80-1829

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually,
and in his official capacity as
State Attorney, Fourth Judicial
Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES E. MACKEY, JR.
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OPINION BELOW

Respondents oppose the Petition for Writ of Certiorari, seeking review of the decision of the United States Court of Appeals for the Fifth Circuit, Roberts v. Austin, reported at 632 F.2d 1202 (5th Cir. 1980) and contained at Appendix 1-55 of the Petition for Writ Of Certiorari. [1]

JURISDICTION

The opinion of the Fifth Circuit in Roberts v. Austin is dated December 15, 1980; on January 13, 1981, the Fifth Circuit denied the motion of Petitioners for rehearing en banc, and denied the motion of Petitioner for Stay of Mandate. Petitioners are seeking a Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether, pursuant to Food Stamp Act of 1977, 7 U.S.C. 2011 et seq. and regulations promulgated thereunder, a state agency operating a Food Stamp Program may release any and all case files of Food Stamp recipients to a state prosecutor for investigative purposes, in circumstances where there is no basis to suspect fraud on the part of the affected recipients?

2. Whether the Court of Appeals erred in holding that irreparable harm would result to affected recipients if the state agency administering the Food Stamp Program in Florida were allowed to release any and all Food Stamp case files to a prosecutor for criminal investigation during pendency of this litigation?

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[1] In two places Petitioners' reproduction of the 5th Circuit's opinion does not distinguish the Court's language from material it cites. At App. 21-22, the Court quotes from Comments of the Dept. of Agriculture, and at App. 22-23, the Court quotes from H.R. Rep. 96-788. In Petitioner's Appendix, neither quote is demarcated from the Court's own language. Compare App. 21-23 with 632 F.2d at 1210.

STATEMENT OF THE CASE

This action was filed as a class action on behalf of Food Stamp recipients in a four-county area of Florida known as the Fourth Judicial Circuit. Prior to the filing of the lawsuit on February 28, 1980, the Department of Health and Rehabilitative Services (hereinafter "HRS"), the state agency administering the Food Stamp Program in Florida, had been, on request, providing unlimited access to all case files of Food Stamp recipients to the state prosecutor for the circuit. The prosecutor's office sought access to the files for the purpose of conducting criminal investigations of every recipient household receiving in excess of $100/month in Food Stamps. HRS released case files to the prosecutor solely upon request, and without any basis to suspect fraud on the part of the affected recipients. The factual circumstances are described in greater detail in the opinion of the Fifth Circuit, Roberts v. Austin, 632 F.2d 1202, 1203-1207, Petitioners' Appendix (hereinafter "App.") 4-15. Recipients contended that this release of case files violated the Food Stamp Act of 1977, 7 U.S.C. § 2011 et seq. and the regulations promulgated thereunder. Recipients sought a preliminary injunction from the District Court for the Middle District of Florida. Recipients sought an injunction which would enjoin HRS from releasing the case files of recipients to the prosecutor absent reason to suspect fraud on the part of the affected recipients. On April 11, 1980, the District Court denied the preliminary injunction. The Fifth Circuit granted an expedited appeal, and on December 15, 1980, the Fifth Circuit panel unanimously reversed the District Court and directed entry of the preliminary injunction. The

state agency and the state prosecutor for the Fourth Judicial Circuit moved for rehearing en banc and for a Stay of Mandate. On January 13, 1981, the Fifth Circuit Court of Appeals denied both motions.

In directing entry of the preliminary injunction, the Fifth Circuit concluded that Recipients were substantially likely to prevail on the merits of their regulatory claim, 632 F.2d at 1213, App. at 36, and that recipients would be irreparably harmed if the injunction were not entered, 632 F.2d at 1214, App. at 36-38. The Court found that under the Food Stamp Act and regulations, a state agency administering the Food Stamp Program could turn over case files to a state prosecutor only when there was valid reason to suspect fraud in the particular household. The Court found that recipients had a "legitimate expectation" that information provided to the program would be kept confidential absent reason to suspect fraud. The Court noted limitations in the Act and regulations on the nature and type of verification to be conducted by the state agency, and observed that by "the simple expedient of turning over all case files to a state attorney, HRS may accomplish indirectly the verification which it is barred from doing by the federal food stamp regulations." 632 F.2d at 1211, App. at 26.

The Court also held that when a legitimate expectation of privacy exists, the violation of privacy is harmful in and of itself. The Court therefore concluded that irreparable harm would result if the state agency were free to release 70,000 additional case files to the prosecutor during the pendency of the action. Considering the substantial likelihood of success, the presence of

irreparable harm, and the absence of harm to the other parties or the public interest, the Court held it was error for the District Court to deny entry of a preliminary injunction.

In the District Court and Court of Appeals, recipients have also contended that the unrestricted release of case files sought by the state agency would violate recipients' constitutional rights of disclosural privacy. Whalen v. Roe, 429 U.S. 589 (1977). Nixon v. Administrator of General Services, 433 U.S. 425 (1977). Plante v. Gonzalez, 575 F.2d 1119 (5th Cir. 1978). Because the Court of Appeals resolved the regulatory issue in favor of recipients, the Court did not address the constitutional issue. 632 F.2d at 1214, App. at 38-39.

ARGUMENT

This case is not appropriate for a grant of certiorari, because the decision of the Fifth Circuit does not conflict with other judicial decisions, the case is still at a preliminary stage, and there is no basis for the contention that the Fifth Circuit erred in its decision.

First, the decision of the Fifth Circuit conflicts with no other case law. It does not conflict with any decision of this Court. It does not conflict with the decision of any other Court of Appeals (or of any District Court other than the one it reversed). It does not conflict with the decision of a court of last resort of any state.

Second, the course of the litigation thus far has been limited to the disposition of the request for preliminary injunction. As yet, there has been no permanent injunctive relief granted or denied. The District Court has held no trial on the merits. There has been no final order. The action of the Court of Appeals for which Petitioners seek review was an order remanding the case to the District Court for entry of a preliminary injunction.

This Court has previously held that where a Court of Appeals has remanded a case for further action by the District Court, the case is "not yet ripe for review" by the Supreme Court. Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Arogstook Railroad Co., 389 U.S. 327 (1976). The Court has stated that the fact that a decree for which review is sought is not final, is in itself a sufficient ground to deny a writ of certiorari, and that except in extraordinary cases, the writ of certiorari is not entered until the final decree. Hamilton-Brown Shoe Co. v. Wolf Brothers & Company, 240 U.S. 251 257-258 (1916).

There are no extraordinary circumstances that would merit granting the writ herein. In determining that a preliminary injunction should be granted, the Fifth Circuit expressly found that the entry of the injunction would not affect the normal process by which food stamp fraud is investigated and prosecuted in Florida. 632 F.2d at 1213, App. at 35-36. The Court concluded that the preliminary injunction "merely prohibits the state attorney from conducting a fishing expedition in food stamp files" during the pendency of the litigation. 632 F.2d at 1213, App. at 35. Despite the

intense tone of the Petition for Writ, the state agency does not contend that the injunction in any manner interferes with the normal, historic process by which food stamp fraud is investigated. In that normal process, whenever the state agency develops or is presented with reason to suspect fraud in a particular case, the agency may release the file for investigation and prosecution. A Court Order enjoining the state agency from turning over all of its files during the litigation is not an extraordinary circumstance that would merit granting the writ.

Third, while the Supreme Court has not had occasion to interpret the particular provisions of the Food Stamp Act and regulations on which the Fifth Circuit based its decision, there is no basis to believe that the Court of Appeals erred. The Court conducted a careful and detailed analysis in concluding that recipients were substantially likely to prevail on the claim that the Act and regulations bar state agencies from releasing case files absent reason to suspect fraud. In examining the regulatory structure of the Food Stamp Program, the Fifth Circuit found an intention by Congress and the Department of Agriculture to maintain the confidentiality of case files in the Food Stamp Program. The Court found that the sole section of the implementing regulations which makes reference to prosecutors authorizes the referral to state prosecuting authorities in cases where individuals are suspected of committing fraud. 632 F.2d at 1210, App. at 24-25. The Court found that under the Food Stamp Act and regulations, the state agency was expressly barred from certain types and methods of verification absent reason to question the information provided by recipients. 632 F.2d at 1208-10, App. at 19-24. The Court found that by turning over all case files to a prosecutor, the state agency

was seeking to accomplish indirectly the verification which it was barred from doing in the federal food stamp regulations. 632 F.2d at 1211, App. at 26.

The Court also noted, citing applicable regulations and testimony before Congress, that substantially similar congressional language in the Aid to Families With Dependent Children Program, 42 U.S.C. § 601 et seq., had been interpreted to bar referral of a case file to a prosecutor where there is no basis to suspect fraud. The Court noted that there was no reason to interpret the Food Stamp regulatory language in a manner which would result in the same congressional language leading to inconsistent protections. 632 F.2d at 1212, App. at 23-27.

In their Petition for Writ of Certiorari, as throughout this litigation, the state agency and prosecutor have continued to assert that the prosecutor could prosecute more fraud cases if the state agency turned over all of its files and the prosecutor was allowed to utilize those files to investigate any and all recipients. This assertion relates solely to the wisdom of existing rules, and is not properly directed to the Court.

While recipients believe that the regulatory structure is eminently sensible as an attempt to balance the privacy rights of applicants/recipients and the need to investigate fraud where there is some basis to suspect fraud, the wisdom of the regulatory structure is not before the Court. The question for the Court is whether there is reason to believe that the Court of Appeals erred in its analysis of the Act and the regulations. In that regard, while Petitioners indicate their dislike for the Court of Appeals' conclusions, they do not indicate how or where the Court erred.

In their Petition for Writ, Petitioners raise for the first time the argument that if the Fifth Circuit correctly interpreted the Food Stamp regulations, then those regulations are inconsistent with the Food Stamp Act. The Act, at 7 U.S.C. § 2013(c) authorizes the Secretary of Agriculture to issue such regulations consistent with the Act "as the Secretary deems necessary or appropriate for the effective and efficient administration of the Food Stamp Program."

This Court has previously stated that:

> Where the empowering provision of a statute states simply that the agency may "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," we have held that the validity of a regulation promulgated thereunder will be sustained so long as it is "reasonably related to the purposes of enabling legislation."

Mournig v. Family Publication Service, Inc., 411 U.S. 356, 369 (1973) quoting Thorpe v. Housing Authority of City of Durham, 393 U.S. 268, 280-281 (1969).

In the instant case, the question then becomes whether there is a reasonable relationship between the Congressional purpose of raising the levels of nutrition among low-income households, 7 U.S.C. § 2011, and the creation of a regulatory structure wherein an applicant for Food Stamps is not compelled to waive all privacy rights in order to receive program benefits. Plainly, a reasonable relationship exists.

In Congressional consideration of the Food Stamp Act Amendments of 1980, Congress' continued sensitivity to the importance of recipient privacy interests was apparent:

> The Program need for certain information is great, but it must be carefully balanced by the need to protect needy individuals from having their privacy bartered away in order to assuage their hunger.

H.R. Report 96-788, Food Stamp Act Amendments of 1980, at 106. The Congressional goal of encouraging the participation of eligible individuals is clearly fostered by a structure of rights wherein an applicant who complies with all program verification requirements in a satisfactory manner is not subjected to unwarranted investigation and invasion of privacy.

The regulatory structure objected to by the state agency and prosecutor is rational and reasonably related to the purposes of the Food Stamp Act. That the state agency and prosecutor disagree with the regulations does not make them irrational.

In sum, the state agency and state prosecutor express disagreement with the Court of Appeals, but do not cite error. After a careful analysis, the Court of Appeals noted a careful balancing of rights in the Food Stamp Act and regulations. Petitioners object to the balance which was struck. That is not a basis for this Court to grant certiorari.

CONCLUSION

The decision for the Fifth Circuit for which review is sought does not conflict with decisions of other courts, is not a final order, does not result in harm to the Petitioners, and is not in error. The Petition for Writ of Certiorari should be denied.

JAMES E. MACKEY, JR.
Attorney for Respondents
Jacksonville Area Legal Aid, Inc.
604 Hogan Street
Jacksonville, Florida 32202
(904) 356-8371

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the foregoing have been furnished to each of the following persons by U.S. Mail, this 14th day of May, 1981:

Leo Stellwagen, Esquire
District IV Counsel
Department of HRS
P.O. Box 2417-F
Jacksonville, Florida 32231

Stephen R. White, Esquire
Office of State Attorney
Duval County Courthouse
Jacksonville, Florida 32202

Richard W. Kreidler, Esquire
Attorney for Petitioners
4140 Woodcock Drive, Suite 224
Jacksonville, Florida 32207

Fred Tromberg, Esquire
Attorney for Petitioners
1916 Atlantic Boulevard
Jacksonville, Florida 32207

James E. Murray Jr.
ATTORNEY

RECEIVED
MAY 18 1981
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OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually, and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

vs.

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Respondents.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondents, by and through their undersigned counsel, ask leave to file the attached Brief in Opposition to Petition for Writ of Certiorari in compliance with the requirements of Rule 46, and to proceed in forma pauperis pursuant to Rule 46 in this case.

Affidavits of the Respondents in support of this motion are attached hereto.

JAMES E. MACKEY, JR.
Attorney for Respondents
Jacksonville Area Legal Aid, Inc.
604 Hogan Street
Jacksonville, Florida 32202
(904) 353-3636

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished to each of the following persons by U.S. Mail, this 14th day of May, 1981:

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Fred Tromberg, Esquire
Attorney for Petitioners
1916 Atlantic Boulevard
Jacksonville, Florida 32207

James G. Muckley Jr.
ATTORNEY

NO: A-842

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OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, MARY JO ROBERTS, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

Respondents filed an action in the District Court, Middle District of Florida, seeking, in part, a preliminary injunction to enjoin the state agency administering the Food Stamp Program in Florida from releasing recipient case files to a prosecutor in circumstances where there is no basis to suspect fraud

on the part of the affected recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeals' decision.

Mary G Roberts
MARY JO ROBERTS

Sworn to and subscribed before me
this 28th day of April, 1981.

Carol Hooks
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

Notary Public, State of Florida at Large
My Commission Expires May 10, 1982
Bonded By American Fire & Casualty Company

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually
and in his official capacity as
State Attorney, Fourth Judicial
Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, JANE DOE, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said case.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

Respondents filed an action in the District Court. Middle District of Florida, seeking, in part, a preliminary injunction to enjoin the state agency administering the Food Stamp Program in Florida from releasing recipient case filed to a prosecutor in circumstances where there is no basis to suspect fraud

on the part of the affected recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeal's decision.

Jane Doe
JANE DOE

Sworn to and subscribed before me
this 27th day of April, 1981.

NOTARY PUBLIC, STATE OF FLORIDA
MY COMMISSION EXPIRES:

Notary Public, State of Florida at Large
My Commission Expires May 10, 1982
Bonded by American Fire & Casualty Company

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually and in his official capacity as State Attorney, Fourth Judicial Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, ALICE ROBERTS, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

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Alice Roberts
ALICE ROBERTS

Sworn to and subscribed before
me this 24th day of April, 1981.

Carol Hogan
NOTARY PUBLIC, STATE OF FLORIDA

MY COMMISSION EXPIRES:

Notary Public, State of Florida at Large
My Commission Expires May 10, 1982
Bonded By American Fire & Casualty Company

NO: A-842

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

T. EDWARD AUSTIN, individually
and in his official capacity as
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Circuit, State of Florida, et al.,

Petitioners,

vs.

ALICE ROBERTS, et al.,

Respondents.

AFFIDAVIT

I, CLARA LEE LONDON, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed in forma pauperis:

1. I am the Respondent in the above-entitled case.

2. Because of my poverty I am unable to pay the costs of said cause.

3. I am unable to give security for the same.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said cause is briefly stated as follows:

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recipients. The District Court denied the preliminary injunction, and the Fifth Circuit Court of Appeals reversed the District Court and directed entry of the preliminary injunction. Petitioners are seeking a writ of certiorari for review of the Court of Appeals' decision.

Clara Lee London
CLARA LEE LONDON

Sworn to and subscribed before me
this 28th day of April, 1981.

[redacted]
NOTARY PUBLIC, STATE OF FLORIDA

My commission expires:

Barry A. Postman

NOTARY PUBLIC, STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES SEPTEMBER 28, 1984
BONDED THROUGH NOTARY-ASHTON, INC.